In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 946

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

LELAND POWERS, EXECUTOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondents contend that the decision of the court below presents no question which this Court will care to review. In support of this contention the respondents argue that the decision below is predicated upon the ground that under the Special Act of the Massachusetts legislature they, as trustees of the Boston Elevated Railway, were not only public officers of the State, but also were exercising essential governmental functions and hence, under the terms of the regulations of the Treasury Department, compensation received by the respond-

ents was exempt from Federal income taxation. The respondents attempt to characterize the broader grounds which the court below invoked in support of its conclusion as dictum. Upon this premise the respondents assert that the decision below does not necessarily hold invalid the regulations of the Treasury Department and does not necessarily present an important question of constitutional law.

The decision below is predicated upon two grounds; first, that under the Massachusetts Special Act the trustees were public officers exercising essential governmental functions in that they were authorized to fix rates and declare deficits which upon certification to the state treasurer were to be raised by taxation. In this view the court below concluded that the compensation of the respondents as trustees was exempt from income taxation under the terms of the Treasury Department regulations. Second, that irrespective of the character of the functions performed by the trustees their compensation was exempt from the income tax merely by virtue of their status as public officers of Massachusetts. The opinion of the court below makes it plain that the decision is rested upon two grounds, either of which the court deemed sufficient to support the judgment. It cannot fairly be said that the decision is rested upon either ground to the exclusion of the other. There is no room in the opinion for the characterization of the

broader grounds upon which the decision is rested as dictum.

With respect to the first ground of the decision, we have pointed out that the authority conferred on the trustees to fix rates and to declare deficits was essentially the same as the authority conferred on the company itself when private operation should be resumed. There is nothing in the nature of such authority which partakes of a governmental character. The exercise of such authority by the trustees is no more governmental than the exercise of the same or like authority by the private corporation which owned the property. It is only by virtue of this erroneous conception of the duties and powers exercised by the trustees that the court below could reach the conclusion that the compensation of the trustees was exempt from the Federal income tax under the provisions of the Treasury Department regulations. If, as we contend, the powers conferred upon and exercised by the trustees were simply the management and operation of the street railway and were in nowise governmental, it is plain that under the Treasury regulations their compensation would not be exempt. The first ground of the court's decision therefore presents directly the question whether the trustees appointed under the Special Act solely for the management and operation of the street railway were engaged in exercising essential governmental functions of the State. The conclusion of the court be-

low upon this question is, as we have pointed out in the petition, inconsistent if not directly in conflict with decisions of this Court and decisons of other Circuit Courts of Appeals. That question, we submit, is one of public importance and merits a review and decision of this Court.

The second ground of the decision upon which the court placed as great if not greater reliance was that the trustees, as public officers of the State, were exempt from Federal income taxation for that reason alone. The court in that connection held expressly that the Treasury regulations, under which compensation of state officers and employees is exempt from Federal income taxation only if such officers or employees are engaged in exercising essential governmental functions, are invalid. As we pointed out in the petition, the holding of the court below that state agencies or instrumentalities, whether or not engaged in the exercise of governmental functions are exempt from Federal taxation, is in conflict with decisions of this Court and of other Circuit Courts of Appeals. In holding that a state officer is exempt from Federal income taxation merely by virtue of his official position, whether or not he be engaged in the exercise of governmental functions, the court below extends the doctrine of implied immunity of the agencies of one government from taxation by the other beyond its proper scope and ignores the underlying reasons for and the necessary limitations upon the doctrine as re-

peatedly declared by this Court. Cf. *Willcuts* v. *Bunn*, 282 U.S. 216, 225; *Board of Trustees* v. *United States*, 289 U.S. 48, 59.

The decision of the court below, upon either or both of the grounds stated in its opinion, presents a question of distinct public importance. Upon either ground the decision below is inconsistent, if not in direct conflict, with decisions of this Court and of other Circuit Courts of Appeals. The respondents state that the decision depends on its own peculiar facts. It is of course true of all cases of this sort that the facts on which they arise vary, but the decision below does not depend on these facts. It is of broad and sweeping application, and if erroneous, and if allowed to stand, it will certainly tend to the development of an unwarranted extension of the field of implied immunity. Such a decision, we submit, falls within the class of cases which should be reviewed by this Court.

We respectfully submit that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.
JOHN MACC. HUDSON,
ERWIN N. GRISWOLD,
Special Assistants to the Attorney General.

MAY 1934.

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